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In The

Supreme Court of the United States

October Term, 1969

No. 1193

HAROLD L. BURKE, PIONEER CASUALTY COMPANY, a Texas corporation, and PIONEER GENERAL AGENCY, INC., a Texas corporation,

Petitioners,

vs.

THOMAS C. HUNT, Conservator and Trustee of North Central Fire & Casualty Co., SAMUEL H. WEESE, Receiver of North Central Fire & Casualty Co., FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Maryland corporation, and MURPHY FINANCE COMPANY, a Minnesota corporation,

Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

DORSEY, MARQUART, WINDHORST, WEST & HALLADAY
By HENRY HALLADAY,
Counsel of Record
And JAMES B. VESSEY
And ROBERT A. SCHWARTZBAUER
2400 First National Bank Bldg.
Minneapolis, Minnesota 55402
Attorneys for Respondent Murphy Finance Company

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I. STATEMENT OF THE CASE

Petitioners' statement of the case is generally correct and requires only the following clarification. Murphy Finance Company's (hereinafter Murphy) motions to implead petitioners as third- and fourth-party defendants were denied by a discretionary order of the district court (App. A-56). Review of that discretionary order as a matter of right was denied by the Minnesota Supreme Court (App. A-12). Review of the trial court's discretionary order was granted by the Minnesota Supreme Court, however, as a matter of its discretion (App. A-13). The motion granting Murphy leave to implead petitioners was granted on grounds of judicial

expediency and in order to save petitioners expenses of additional litigation (App. A-45).

II. ARGUMENT

A. The United States Supreme Court has no jurisdiction over that portion of the decision by the Minnesota Supreme Court which grants Murphy Finance Company's motion for leave to join petitioners Burke, Pioneer Casualty Co. and Pioneer General Agency, Inc., as third- and fourth-party defendants.

It is unclear from petitioners' brief whether they seek to question the validity of that part of the judgment by the Minnesota Supreme Court which grants leave to Murphy to join petitioners as third- and fourth-party defendants. Petitioners state in note 11 (Pet. 14) they

> seek review of the constitutional questions presented by Murphy's extraterritorial impleader in conjunction with the same questions presented in the principal action and the Bonding Company's action. *For purposes of this petition, the due process arguments against all respondents are essentially the same* (emphasis added).

It appears petitioners intend to question that portion of the judgment granting Murphy's motion for leave to implead petitioners as third- and fourth-party defendants.

1. **No federal question is presented by the decision of the Minnesota Supreme Court granting Murphy's motions to implead petitioners.**

The United States Supreme Court has no jurisdiction to issue a Writ of Certiorari to a state supreme court where no federal question is specially set up in the state court action.[1]

Petitioners contend that the Minnesota Supreme Court's decision on Murphy's motions for leave to implead resolves against petitioners in advance their objections to personal jurisdiction in connection with Murphy's claims. They apparently contemplate an application of the doctrines of collateral estoppel or law of the case. According to petitioners, if the Minnesota court's judgment on petitioners' motions is not overruled, petitioners will be unable to avail themselves of the arguments on the jurisdictional issues in a suit between Murphy and petitioners.

Assuming *arguendo* this is correct, it does not mean that the questions of jurisdiction and the discretionary issue posed by Murphy's motion are dependent; on the contrary, these issues are independent. If petitioners' motion to dismiss had been granted, Murphy's motion to implead could have been granted. Murphy would not be bound by the decision in the original action since to so hold would deny Murphy the opportunity to be heard on the question whether

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[1] 28 U.S.C. § 1257(3), under which this petition is brought provides that the Supreme Court may review judgments rendered by the highest court of a state:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or *where any title, right, privilege or immunity is specially set up or claimed under the Constitution*, treaties or statutes of, or commission held or authority exercised under, the United States (emphasis added).

See also Angel v. Bullington, 330 U.S. 181 (1947); C. A. WRIGHT, FEDERAL COURTS, § 107 (1963).

Murphy had jurisdictional bases distinct from those available to those parties who had already served process against petitioners. Therefore, the judgment granting Murphy's motion for leave to implead is independent of the specific decision on jurisdiction sought to be reviewed and in no way raises constitutional questions.

The judgment of the Minnesota Supreme Court on Murphy's motions merely allowed Murphy to institute actions against the petitioners as third- and fourth-party defendants. That judgment involved the review by the Minnesota Supreme Court of a discretionary order of the district court. It involved no determination of jurisdiction in any action between Murphy and petitioners because none was then pending. The question of jurisdiction over petitioners in such an action cannot be raised until the suit is commenced and petitioners answer or otherwise plead. The judgment by the Minnesota Supreme Court merely granted leave to commence such an action. To the extent any questions of jurisdiction in connection with an action between Murphy and petitioners were considered—Murphy contends no such consideration was made—these considerations were premature.

The United States Supreme Court has recognized that, generally, where a state supreme court proceeds in the area in which state practice is controlling, no federal question is raised. *First Nat'l Bank v. Anderson*, 269 U.S. 341 (1926). *Cf. Yazoo and Mississippi Valley Ry. v. Adams*, 180 U.S. 1 (1901). As discussed above, Murphy's motions to implead petitioners were addressed to the discretion of the district court. The district court's ruling was reversed solely on discretionary grounds. A judgment on matters involving the discretionary application of a state's rules of procedure is clearly a matter in which the state's laws are controlling. Therefore, the United States Supreme Court is without jur-

isdiction to grant a Writ of Certiorari to the Supreme Court of the State of Minnesota.

2. Even if that portion of the judgment granting Murphy's motions to implead does involve constitutional considerations, no federal question was "set up" below: Therefore, this Court has no jurisdiction to grant the petition.

The jurisdictional statement contained in the Petition for Writ of Certiorari does not mention that portion of the judgment granting Murphy's motions nor in any way indicate that that portion of the judgment calls into question the due process clause of the Fourteenth Amendment to the United States Constitution. Petitioners' statement of the questions presented (Pet. 3) does not mention the discretionary relief granted to Murphy, nor do these questions indicate the manner in which the judgment by the Minnesota Supreme Court granting leave to Murphy to implead petitioners in any way involves a deprivation of due process. The Petition for Writ of Certiorari does not state the stage of the proceedings in the trial court at which any questions of due process related to Murphy's motion to implead were raised. The petition does not comply with any of the requirements of Rule 23(f) of the Rules of the Supreme Court of the United States insofar as petitioners intend to question that portion of the judgment related to Murphy.

The reason for this failure is apparent. At no time during the proceedings below was any federal question raised in connection with Murphy's motion to implead petitioners. The opinion of the Minnesota Supreme Court indicates that Murphy's motion was granted to save petitioners expenses of litigation and due to the "unnecessar[y] burden [on] the judicial machinery of the state." (App. A-45.) At no time was Murphy's motion considered in constitutional perspectives. Where this is the case, this Court is without jurisdiction to

grant a Writ of Certiorari, 28 U.S.C. § 1257(3). (*See* note 1, *supra*); *Herndon v. State of Georgia*, 295 U.S. 441 (1935); *Atlantic Coastline R.R. v. Mims*, 242 U.S. 532 (1917).

3. In a line of cases analogous to the instant situation, this Court has held that it lacked jurisdiction.

The argument that the Court has no jurisdiction over the portion of the judgment dealing with Murphy's motion is based on the premise that the judgment below involved multiple issues. Several of these issues are set forth in the Petition for Writ of Certiorari (Pet. 3). For present purposes, these questions will be referred to as "jurisdictional issues." The judgment below also involved the question whether the Minnesota Supreme Court should exercise its discretion to overrule the discretionary order of the district court denying Murphy's motions to implead petitioners. For present purposes, this question will be referred to as "Murphy's issue." As the foregoing indicates, Murphy's issue and the jurisdictional issues are independent. (*See* pp. 3-4, *supra.*) The arguments made above, Parts 1 and 2, demonstrate that no federal question exists on Murphy's issue. Arguably, a federal question does exist with respect to the jurisdictional issues. Both the jurisdictional issues and Murphy's issue were decided below. Therefore, the question raised is whether, where a Petition for Writ of Certiorari seeks review of an issue raising a federal question which issue arises from a judgment in which an issue that does not raise a federal question was also decided, does the Supreme Court have jurisdiction over the non-federal question.

In some situations, jurisdiction of the Supreme Court has been taken on all issues presented where some of the issues raised a substantial federal question sufficient to con-

fer jurisdiction while other issues did not.[2] However, these cases are not in point, and the reasons underlying the exercise of jurisdiction therein are not applicable to the present situation. No case arising under 28 U.S.C. § 1257(3) was found in which the Court, faced with two issues, one of which was sufficient to confer jurisdiction and the other being insufficient in itself, has granted a Writ of Certiorari to decide both questions.

Murphy submits that an analogy may be drawn from those cases involving what may be called the "independent state ground" rule. It is a general rule that

> where the judgment of the state court rests upon two grounds, one of which is federal and the other non-federal in character . . . jurisdiction [of the Supreme Court] fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.

Fox Film Corp. v. Muller, 396 U.S. 207, 210 (1935); *Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487 (1965). Jurisdiction is lacking in such a case because no one ground can be said to be "necessary." An opinion by the Court on one of the grounds would be "advisory" to that extent. The Court wisely refuses to render advisory opinions. *Walters v. City of St. Louis*, 347 U.S. 231 (1954). Therefore, in such a situation, the Supreme Court will not grant a Writ of Certiorari to the state supreme court.

This reasoning is applicable to the situation in which two *independent issues* are presented one of which raises a substantial federal question while the other does not as is the case here with the jurisdictional issues and Murphy's issue.

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[2]*See, e.g., Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960), involving direct appeal under 28 U.S.C. § 1253. *Cf. Pennsylvania R.R. v. Erie Ave. Whse. Co.*, 302 F.2d 843 (3rd Cir. 1962), and related cases involving ancillary jurisdiction.

An opinion on the non-federal (Murphy's) question would be advisory to the same extent as in the foregoing situation. The Supreme Court therefore has no jurisdiction over Murphy's issue.[3]

B. If it is determined that the Supreme Court will take jurisdiction to issue a Writ of Certiorari to the Supreme Court of Minnesota as to that portion of the court's decision granting to Murphy leave to implead petitioners, the Supreme Court should nevertheless deny the Petition for Writ of Certiorari.

Rule 19 of the Rules of the United States Supreme Court states that certiorari will be granted only if the state court has decided a federal question of substance. Therefore, the arguments discussed above in Part A are relevant here.

Decisions such as *First Nat'l Bank v. Anderson, supra*, and *Yazoo and Mississippi Valley Ry. v. Adams, supra*, recognize that matters of procedure are peculiarly within the sphere in which state decisions should be controlling. Our federal system of courts clearly contemplates two independent judicial systems with independent practices. Other decisions by this Court, too numerous to mention, have upheld this bifurcation. A matter addressed to the discretion of a trial court, reviewed as such by the state supreme court and involving only rules of practice designed to facilitate practice and pleading is clearly a matter which should not be interfered with by the federal judiciary. Certainly, no question involving a matter such as this raises questions of sufficient substance and importance to warrant an exercise of this Court's discretion to grant a Writ of Certiorari.

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[3]The doctrine first announced in *Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157 (1917), to the effect that jurisdiction attaches where the non-federal ground is so interwoven with the federal ground as not to be an independent matter is not applicable to a situation such as this where the issues are clearly independent. (See pp. 3-4, *supra*).

III. CONCLUSION

Respondent Murphy prays if certiorari to the Supreme Court of Minnesota is granted, review should be limited to jurisdictional issues. No review should be made of that portion of the decision below which grants Murphy's motions to implead petitioners.

Respectfully submitted,

DORSEY, MARQUART, WINDHORST,
WEST & HALLADAY
By HENRY HALLADAY,
Counsel of Record
And JAMES B. VESSEY
And ROBERT A. SCHWARTZBAUER
2400 First National Bank Bldg.
Minneapolis, Minnesota 55402
Attorneys for Respondent
Murphy Finance Company